

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM E. MOODY,

Defendant-Appellant.

UNPUBLISHED

May 25, 2001

No. 219570

Wayne Circuit Court

LC No. 97-009692

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for third-degree criminal sexual conduct (“CSC III”) (sexual penetration with a person who is at least thirteen years of age and is under sixteen years of age), MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Defendant was sentenced to five to fifteen years in prison. We affirm.

On October 25, 1997, defendant, a close friend, was visiting the victim’s family. That night, defendant grabbed the victim, who was a thirteen-year-old girl, put his hand over her mouth, pulled her pants down, and digitally penetrated her vagina. The victim’s aunt entered the room, saw defendant on top of the victim with his pants down, and told defendant to leave. The victim’s aunt then called the police and defendant was arrested eleven days later.

I

Before the trial, defendant filed a motion for the production of the transcript of a probate court hearing involving defendant’s children. The trial court denied defendant’s motion. On appeal, defendant argues that the trial court’s denial of this motion violated his constitutional right to present a defense because the transcript would have: (1) shown that the victim’s aunt had a financial motivation to fabricate allegations of a sexual assault against defendant because she would benefit by the \$200,000 settlement of a lawsuit involving defendant’s daughter; (2) shown that the victim’s aunt had a personal motive to fabricate allegations of a sexual assault against defendant by showing that she lived with defendant’s wife after defendant’s arrest; and (3) provided a basis to impeach the victim’s aunt with prior inconsistent statements. Defendant argues that he was indigent and had the right to the transcript because it was necessary to present an adequate defense. We disagree. Constitutional issues are reviewed de novo on appeal. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

The state must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense when those tools are available for a price to other prisoners. The state must provide an indigent defendant with a transcript of prior proceedings when the transcript is needed for an effective defense. *People v Brown*, 126 Mich App 763, 765; 337 NW2d 915 (1983). There are two factors relevant to the determination of whether a defendant's request for a free transcript should be granted: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same functions as a transcript. *Id.* at 765-766. Where the defendant requests a transcript of a proceeding held in a case to which he was not a party, such as the instant case, he must demonstrate a particularized need for the transcript. *Id.* at 767-769.

In regard to the insurance settlement, the transcript might have been valuable to defendant's defense because defendant argues that it would have shown that his imprisonment would have caused the victim's aunt to benefit from an insurance settlement intended for defendant's daughter. This information would be valuable to show the victim's aunt's motivation to fabricate the charges against defendant. However, defendant had alternative means to obtain this information. Defense counsel knew about the insurance policy and could have cross-examined the victim's aunt concerning this issue at trial, but chose not to do so.

In regard to defendant's wife living with the victim's aunt, defendant has not shown a particularized need for this information in the transcript. At trial, defendant established that the victim's aunt and defendant's wife remained in close contact after defendant was arrested and even lived together for a time. Defendant did not claim that he could have obtained any other information from the probate transcript concerning this subject that he could not have obtained at trial in the instant case.

Finally, in regard to the alleged prior inconsistent statements, defendant failed to show how these inconsistent statements would have been valuable to his defense or even that there was any reason to believe that any inconsistencies could be shown. At the motion hearing, defendant argued that the victim's aunt made inconsistent statements concerning the date of when the crime occurred. Defendant argued that the victim's aunt testified in the probate hearing that the crime occurred in October, but that was accurate and consistent with her trial testimony. Defendant never cross-examined the victim's aunt concerning the date of the offense, although he had the opportunity to do so at trial. Most importantly, the date of the crime was not an issue in this trial, so defendant did not have a particularized need for the probate transcript to obtain this information. Defendant has failed to show any error and therefore has not shown that he is entitled to relief as a result of the denial of his transcript request.

II

Defendant claims on appeal that the trial court denied defendant his constitutional right to present a defense by excluding relevant evidence that was necessary to show that there was a motive to fabricate the charges against him. We disagree. The decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion is found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling

made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Constitutional issues are reviewed de novo on appeal. *Conat*, *supra* at 144.

Defendant first argues that the trial court abused its discretion by refusing to provide defendant with the probate hearing transcript. As discussed previously, the trial court did not err by refusing to provide defendant with this transcript.

Next, defendant argues that the trial court abused its discretion by excluding a witness' testimony regarding the incident that gave rise to the \$200,000 insurance settlement involving defendant's daughter. The trial court sustained the prosecution's objection to the witness' testimony on relevance grounds. Defendant made an offer of proof regarding the testimony, offering that the witness would have testified that he had knowledge of how the victim's aunt and defendant's wife would have benefited from the settlement involving defendant's daughter. The trial court ruled that the testimony was hearsay that could have been obtained directly from the victim's aunt. Defendant argues that this testimony was necessary to his defense because it established that the victim, her aunt and others had a motive to conspire against him.

The trial court did not abuse its discretion by excluding the witness' testimony regarding the settlement because the statement was inadmissible hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The trial court correctly held that the witness' testimony would have been hearsay because he would have been testifying as to what he heard the victim's aunt say about the settlement. At trial, defendant had the opportunity to cross-examine the victim's aunt about the settlement, but he opted not to follow this route.

Defendant then argues that the trial court abused its discretion by excluding the witness' testimony concerning what the victim's aunt told the victim's cousin about the sexual assault. Defendant has failed to persuade us that the proposed testimony falls under the state of mind exception to the hearsay rule, MRE 803(3), was a prior inconsistent statement, MRE 801(d)(1), or was valid impeachment. Therefore, the trial court did not abuse its discretion by excluding these statements as inadmissible hearsay.

Defendant also argues that the trial court abused its discretion by excluding, as cumulative, a different witness' testimony that the victim's mother owed defendant money. We agree with defendant that the trial court mistakenly remarked that this evidence was cumulative. However, the trial court did not strike this testimony from the record, so the evidence was admitted anyway. Defendant was free to use this evidence to argue that, because the victim's mother owed defendant money, and because the victim's cousin owed defendant money, they had a motivation to fabricate sexual assault charges against him.

Defendant next argues that the trial court abused its discretion by excluding the witness' testimony that the victim did not actually sleep in the room where she claimed to sleep. The trial court excluded this testimony as not relevant, and we agree. In order to be relevant, evidence must be material and probative to the case and must be related to any fact that is of consequence to the action. *People v Mills*, 450 Mich 61, 67; 537 NW2d 909, modified and remanded on other grounds 450 Mich 1212 (1995). In the instant case, defendant has not shown any reason why the location where the victim normally slept at night would be of consequence to the action.

Defendant's next argument is that the trial court abused its discretion by excluding the witness' testimony that the victim's cousin allowed defendant to take her children to a Rec Center less than a week after the incident. While this testimony was arguably relevant to impeach the victim's cousin by showing that she still trusted defendant with her children after the incident and was not hearsay, any error in its exclusion did not affect a substantial right of defendant, MRE 103(a), because there was already evidence on the record that the victim's cousin still kept in contact with defendant after the incident and may have allowed defendant to pick up her children from school after the incident. Additionally, this evidence would not have impeached the testimony of the victim or her aunt, who were the ones who were present when the offense took place and had the most compelling testimony implicating defendant.

III

Defendant's final argument relates to sentencing. He claims that the trial court impermissibly punished him for exercising his right to a jury trial and abused its discretion by departing upward from the sentencing guidelines. We disagree.

Defendants have a constitutional right to a jury trial and should not be penalized for exercising that right. *People v Mosko*, 190 Mich App 204, 211; 475 NW2d 866 (1991), aff'd 441 Mich 496 (1992). In the instant case, defendant's sentence of five to fifteen years in prison was higher than the *Cobbs*¹ evaluation of two to fifteen years in prison. Defendant argues that the increase in his minimum sentence creates an appearance that defendant was punished for exercising his constitutional right to trial. Defendant further contends that the trial court was exposed to minimal new information at trial that would have caused him to make defendant's minimum sentence that much higher than the *Cobbs* evaluation.

There is nothing in the record to support defendant's contention that the trial court imposed a harsher sentence than the *Cobbs* evaluation as a penalty for defendant's exercise of his right to a jury trial. *People v Rivers*, 147 Mich App 56, 61; 382 NW2d 731 (1985). Instead, the trial judge imposed the sentence based on the violence of the offense, defendant's abuse of his status as a friend of the family, and the age of the victim. It is not per se unconstitutional for a defendant to receive a higher sentence on a trial conviction than was promised him if he would plead guilty. *Rivers, supra* at 60-61.

Defendant also argues that the trial court abused its discretion by departing upward from the sentencing guidelines. We disagree. The offense of which defendant was convicted, CSC III, was committed on October 25, 1997. Therefore, the judicial sentencing guidelines promulgated by the Michigan Supreme Court were used to determine the recommended range of defendant's minimum sentence.

A trial court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Stiller*, 242 Mich App 38, 57; 617 NW2d 697 (2000). Our review of the record leads us to the conclusion that defendant's

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

sentence accurately reflects the seriousness of his offense and is proportionate. Therefore, the trial court did not abuse its discretion in departing upward from the sentencing guidelines range.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey